IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DONALD MICHAEL SWEET, Appellant.	)	2 CA-CR 2006-0029 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20042919

Honorable Kenneth Lee, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 After a jury trial, Donald Sweet was convicted of aggravated driving under the influence of an intoxicant while his license was suspended, canceled, revoked, or refused or in violation of a restriction and aggravated driving with an alcohol concentration of .08 or more while his license was suspended, canceled, revoked, or refused or in violation of a

restriction. The trial court suspended the imposition of sentence and placed Sweet on a four-year period of probation.

¶2 Sweet appeals the court's denial of his motion for a mistrial. According to Sweet, the prosecutor's reference to a "felony stop" by a deputy sheriff improperly drew the jury's attention to possible punishment and deprived him of a fair trial. We find no reversible error in the court's denial of a mistrial and, therefore, affirm Sweet's convictions.

¶3 Pima County Deputy Sheriff William Holden testified that on the day he arrested Sweet, Holden and other deputies had been "looking for Mr. Sweet for an unrelated incident which had occurred at his home." After Holden recognized Sweet's license plate number, he activated his lights and siren and attempted to make a traffic stop just north of an intersection where Sweet's vehicle had been stopped. Sweet did not pull over, but "sped away" and changed lanes and directions as Holden followed him for "approximately one mile."[1] Sweet then pulled into the driveway of his home, and Holden performed what he referred to as a "high risk stop," with "[g]un[] drawn [and issuing] verbal commands from a position concealed behind the suspect vehicle."

¶4 Later, during direct examination, the prosecutor questioned Holden about his omission of field sobriety tests in the following exchange:

> [THE PROSECUTOR:] Now, are you familiar with something called field sobriety tests?

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[1]Holden testified that Sweet's speed had varied between ten and fifty miles per hour, averaging twenty miles per hour, during Holden's three-minute pursuit. Sweet was acquitted of the charge of unlawful flight from a law enforcement vehicle.

[HOLDEN:] Yes, I am.

[THE PROSECUTOR:] And were any administered in this case?

[HOLDEN:] No, sir.

[THE PROSECUTOR:] And was this due to the—

[HOLDEN:] The circumstances.

[THE PROSECUTOR:] And by circumstances, do you mean the felony stop?

[HOLDEN:] The high risk stop.

At this point, Sweet requested a bench conference and moved for a mistrial, arguing that by using the term "felony stop," the prosecutor had improperly directed the jury's attention to an issue of punishment. The court implicitly denied Sweet's motion and asked counsel how they wished to proceed. Sweet told the court he preferred that the reference be clarified through testimony that "a high risk stop is also known as a felony stop." Holden then testified that these two expressions were "different words describing the exact same procedures" and confirmed that either term "just has to do with how the stop is conducted."

¶5 Arizona courts have held it is improper for a prosecutor to call attention to potential punishment when the jury will not be deciding a defendant's sentence. *See, e.g.*, *State v. Cornell*, 179 Ariz. 314, 326-27, 878 P.2d 1352, 1364-65 (1994). In this case, we cannot say the court abused its discretion in declining to find that the prosecutor's isolated reference to a "felony stop" had any such effect. The context of the remark is critical. *Compare id.* at 326-28, 878 P.2d at 1364-66 (prosecutor's questions "designed to convey to the jury that a verdict of not guilty by reason of insanity would result in Defendant's

immediate release" were "both error and prejudicial" but did not constitute fundamental error) *with State v. Jones*, 197 Ariz. 290, ¶¶ 38-40, 4 P.3d 345, 360-61 (2000) (prosecutor's "brief reference to the death penalty in the context of discussing the burden of proof" did not constitute misconduct).

¶6 Here, any potential prejudice was mitigated because Holden corrected the prosecutor's term and testified only about a "high risk stop." *See State v. Roque*, 213 Ariz. 193, ¶ 161, 141 P.3d 368, 404 (2006) (witness "handled the [prosecutor's improper] questions effectively, thereby reducing any prejudicial impact"). The court itself was "not sure the jury noticed" the prosecutor had used the word "felony" but offered Sweet the opportunity to have the issue clarified in case the bench conference had drawn the jury's attention. When Holden agreed that the two terms were synonymous and signified nothing more than the procedure followed during a high-risk stop, the possibility of prejudice was further reduced.

¶7 "[T]he declaration of a mistrial is the most dramatic remedy for a trial error and should be granted only if the interests of justice will be thwarted otherwise." *Id.* ¶ 131. Because "'[t]he trial court is in the best position to determine whether an attorney's remarks require a mistrial,'" we review its decision for an abuse of discretion. *Id.*, *quoting State v. Hansen*, 156 Ariz. 291, 297, 751 P.2d 951, 957 (1988) (alteration in *Roque*).

¶8 According to our supreme court,

> [t]o determine if a prosecutor's comments constituted misconduct that warrants a mistrial, a trial court should consider two factors: (1) whether the prosecutor's statements called to the jury's attention matters it should not have considered in reaching its decision and (2) the probability that the jurors were in fact influenced by the remarks.

State v. Newell, 212 Ariz. 389, ¶ 60, 132 P.3d 833, 846 (2006). Reversal is warranted only if "'the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Roque*, 213 Ariz. 193, ¶ 152, 141 P.3d at 403, *quoting State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998). "'Prosecutorial misconduct is harmless error if we can find beyond a reasonable doubt that it did not contribute to or affect the verdict.'" *Id.* ¶ 152, *quoting Hughes*, 193 Ariz. 72, ¶ 32, 969 P.2d at 1192.[2]

¶9 We have reviewed the record. The evidence against Sweet, including expert testimony about his alcohol concentration, was substantial, and the jury appears to have applied the law to the facts to determine whether elements of the charges had been proved.[3]

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[2]On this issue, we find differing standards of review promulgated by our supreme court. On the one hand, the supreme court has said that a mistrial for prosecutorial misconduct is warranted only if the misconduct is "reasonably likely to have affected the jury's verdict." *State v. Cornell*, 179 Ariz. 314, 328, 878 P.2d 1352, 1366 (1994); *see also Newell*, 212 Ariz. 389, ¶ 67, 132 P.3d at 847; *State v. Prince*, 204 Ariz. 156, ¶ 20, 61 P.3d 450, 454 (2003) ("An improper remark compels a new trial only if it probably influenced the jury in determining their verdict . . . ."). Other decisions, however, like *State v. Roque*, 213 Ariz. 193, ¶ 155, 141 P.3d 368, 403 (2006), and *Hughes*, 193 Ariz. 72, ¶ 32, 969 P.2d at 1192, suggest that prosecutorial misconduct is subject to review under a more stringent harmless error standard, requiring reversal unless the court can say beyond a reasonable doubt that the jury was not influenced by the error. *E.g.*, *State v. Towery*, 186 Ariz. 168, 185, 920 P.2d 290, 307 (1996). In this case, we conclude the trial court did not abuse its discretion under either standard of review.

[3]The jurors submitted several questions during trial. They asked Deputy Holden about whether beer cans depicted in photographs of Sweet's vehicle had been opened and asked witness Seth Ruskin, the criminalist who tested Sweet's blood sample for alcohol concentration, about signs of error during the testing process, whether any of those errors occurred during his analysis, and the frequency of testing error generally. During deliberations, the jury asked the court to "[d]efine slightest degree of impairment."

Moreover, the trial court instructed the jurors that they were to consider the "evidence produced in court" to determine whether Sweet was guilty as charged and explained that statements by counsel were not evidence. The jury was also admonished that it was not to consider possible punishment. "We presume that the jurors followed the court's instructions." *Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d at 847.

¶10 For all of these reasons, we conclude the prosecutor's isolated reference to a "felony stop," followed by the immediate clarification, did not improperly draw the jury's attention to any possible punishment in Sweet's case and did not affect their verdicts. *See Cornell*, 179 Ariz. at 329, 878 P.2d at 1367 ("Whatever prejudice this . . . questioning produced was mitigated by its brevity . . . by the witness' protective answers . . . ."). Because the prosecutorial error, if any, was harmless beyond a reasonable doubt, the trial court did not abuse its discretion in denying Sweet's motion for mistrial. We therefore affirm Sweet's convictions and his placement on probation.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge